Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 18 DECEMBER 26, 1984 No. 52

This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Parts 4 and 6

(T.D. 84-248)

Clearance of Vessels and Aircraft

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General Notice.

SUMMARY: This document advises the public that in order to better control the flow of critical United States technology and equipment, vessels and aircraft carrying certain specified cargo, will not be cleared under the navigation laws administered by Customs for any foreign port or place under pro forma clearance procedures until certain information concerning that cargo is submitted to Customs. To simplify the requirement, Customs will accept the information shown on the Shipper's Export Declarations which are provided to exporting carriers by exporters or their agents before exportation of the cargo.

EFFECTIVE DATE: January 7, 1985.

FOR FURTHER INFORMATION CONTACT: Operational Aspects: Vic Weeren or Eula Walden, Office of Inspection and Control, (202) 566-2140; Legal Aspects: Edward Gable, Office of Commercial Operations, (202) 566-5732; U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

In order to better control the flow of critical U.S. technology and equipment from the United States, on November 28, 1984, the Commissioner of Customs issued instructions to Regional Commissioners and District Directors of Customs, that effective January 7, 1985, vessels and aircraft carrying certain specified types of cargo will not be cleared under the navigation laws administered by Customs for any foreign port or place under pro forma clearance procedures until certain information on that cargo is submitted to Customs. Clearance procedures for vessels and aircraft are contained in §§ 4.60 through 4.75, Customs Regulations (19 CFR 4.60-4.75) and § 6.8, Customs Regulations (19 CFR 6.8). Pro forma clearance procedures are provided for in §§ 4.75 and 6.8, Customs Regulations (19 CFR 4.75 and 6.8).

The instructions issued on November 28 do not address the presentation of SED's for hand-carried shipments or exporters, carriers, and freight forwarders authorized monthly and electronic reporting.

The cargo designated as subject to this clearance requirement is cargo subject to a Department of Commerce validated export license (see Parts 372 and 373, Department of Commerce Regulations (15 CFR Parts 372 and 373)) or cargo subject to a Department of State export license (see Parts 121 and 123, Department of State Regulations (22 CFR Parts 121 and 123)). A carrier transporting some export cargo, some of which is subject to these license requirements, will be subject to the above procedures insofar as that part of the cargo is concerned. Once the required documentations on the licensed export cargo is submitted to Customs, however, the carrier may use the pro forma clearance procedure with regard to the export cargo not subject to license requirements. This will not affect the existing requirement that a complete manifest and all required Shipper's Export Declarations (SED's) must be submitted for all export cargo in vessels and aircraft being cleared for certain specified foreign countries (see T.D. 52676, as amended by T.D. 55259, T.D. 55354 and T.D. 70–6).

To simplify the requirement that carriers submit certain information on the specified export cargo before clearance of the vessel or aircraft, Customs will accept the information as shown on SED's rather than establish new forms for the submission of the information at the time of clearance. Under present requirements, both regular clearance procedures (§§ 4.63 and 6.8)), and pro forma clearance procedures (19 CFR 4.75, 6.8), SED's must be submitted to Customs. Further, under § 30.12 of the Foreign Trade Statistics Regulations of the Bureau of Census (15 CFR 30.12), exporting carriers should now be receiving SED's from exporters or their agents prior to exportation of cargo. Under that regulation, exporters or their agents are subject to penalties for failure to deliver the SED's prior to exportation.

These instructions clarify and limit the present discretionary authority of District Directors of Customs to grant pro forma clearance that is provided for in 19 CFR 4.75 and 6.8. Amendment of the existing applicable provisions of the navigation law requirements of the Customs Regulations is not necessary.

Dated: December 6, 1984.

JOHN P. SIMPSON,
Acting Assistant Commissioner
(Commercial Operations).

[Published in the Federal Register, December 10, 1984 (49 FR 48035)]

(T.D. 84-249)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reseve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372 (c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
November 1, 1984	$0.008058
November 2, 1984	.008153
Israel shekel:	
November 1-2, 1984	N/A
South Korea won:	
November 1, 1984	.001222
November 2, 1984	.001223
Taiwan dollar:	
November 1, 1984	.025445
November 2, 1984	.025458

(LIQ-03-01 S:COM CIE)

Dated: November 2, 1984.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 84-250)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reseve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372 (c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
November 5, 1984	$0.008254

November 7, 1984	.008230
November 8, 1984	.008217
November 9, 1984	.008157
Israel shekel:	
November 5–9, 1984	N/A
South Korea won:	
November 5–7, 1984	.001225
November 8, 1984	.001227
November 9, 1984	.001225
Taiwan dollar:	
November 5, 1984	.025484
November 7, 1984	025458
November 8, 1984	.025445
November 9, 1984	.025432

(LIQ–03–01 S:COM CIE)

Dated: November 9, 1984.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 84–251)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372 (c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
November 13, 1984	$0.008220
November 14, 1984	.008170
November 15, 1984	.008180
November 16, 1984	.008157
Israel shekel:	
November 13–16, 1984	N/A
South Korea won:	
November 13, 1984	.001224
November 14, 1984	.001225
November 15, 1984	.001224
November 16, 1984	.001223

Taiwan dollar:	
November 13, 1984	.025394
November 14, 1984	.025381
November 15, 1984	.025368
November 16, 1984	.025355

(LIQ-03-01 S:COM CIE)

Dated: November 16, 1984.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 84-252)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372 (c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
November 19, 1984	$0.008123
November 20, 1984	.008100
November 21, 1984	.008055
November 23, 1984	.008032
Israel shekel:	
November 19-23, 1984	N/A
South Korea won:	
November 19, 1984	.001222
November 20, 1984	.001221
November 21, 1984	.001220
November 23, 1984	.001218
Taiwan dollar:	
November 19, 1984	.025323
November 20, 1984	.025310
November 21, 1984	.025297
November 23, 1984	.025284

(LIQ-03-01 S:COM CIE)

Dated: November 23, 1984.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 84-253)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
November 26, 1984	$0.007927
November 27, 1984	.007961
November 28–29, 1984	.007918
November 30, 1984	.007893
Isreal shekel:	
November 26–30, 1984	N/A
South Korea won:	
November 26, 1984	.001217
November 27, 1984	.001215
November 28, 1984	.001216
November 29–30, 1984	.001215
Taiwan dollar:	
November 26, 1984	.025316
November 27, 1984	.025329
November 28, 1984	.025316
November 29, 1984	.025304
November 30, 1984	.025297

(LIQ-03-01 S:COM CIE)

Dated: November 30, 1984.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 84-254)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 84-218 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Brazil cruzeiro:	
November 1-2, 1984	$0.000381
Republic of South Africa rand:	
November 1, 1984	.52950
November 2, 1984	.53500

(LIQ-03-01 S:COM CIE)

Dated: November 2, 1984.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 84-255)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 84-218 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Brazil cruzeiro:	
November 5, 1984	$0.000381
November 7-9, 1984	.000376
Republic of South Africa rand:	
November 5, 1984	.55400
Thailand baht:	
November 5, 1984	.037010
November 7, 1984	.037133

(LIQ-03-01 S:COM CIE)
Dated: November 9, 1984.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 84-256)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 84-218 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Brazil cruzeiro:	
November 13-14, 1984	$0.000371
November 15-16, 1984	.000365
Mexico peso:	
November 15, 1984	.004728
November 16, 1984	.004739
Thailand baht:	
November 13-14, 1984	.037202
November 15-16, 1984	.037106

(LIQ-03-01 S:COM CIE)
Dated: November 16, 1984.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 84-257)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 84-218 for the following countries. Therefore, as to entries covering merchandise

exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Brazil cruzeiro:	
November 19–20, 1984	$0.000365
November 21–23, 1984	.000360
Mexico peso:	
November 19–21, 1984	.004739
November 23, 1984	.004717
Republic of South Africa rand:	
November 19, 1984	.55550
November 20, 1984	.55900
November 21, 1984	.55500
November 23, 1984	.55450
Thailand baht:	
November 19, 1984	.037106
November 20–23, 1984	.037037

(LIQ–03–01 S:COM CIE)

Dated: November 23, 1984.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 84–258)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 84–218 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Brazil cruzeiro:	
November 26–29, 1984	$0.000354
November 30, 1984	.000347
China, P.R. renminbi yuan:	
November 26, 1984	.361991
November 27–30, 1984	.357871

Mexico peso:	
November 26, 1984	.004728
November 27, 1984	.004739
November 28, 1984	.004728
November 29, 1984	.004723
November 30, 1984	.004693
Republic of South Africa rand:	
November 26, 1984	.54850
November 27, 1984	.54650
November 28, 1984	.53750
November 29, 1984	.54000
November 30, 1984	.53800
Thailand baht:	
November 26, 1984	.037037
November 27–30, 1984	.036969

(LIQ–03–01 S:COM CIE)

Dated: November 30, 1984.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notice

Application for Recordation of Trade Name: "Gerber Products Company"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of Application for Recordation of Trade Name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "GERBER PRODUCTS COMPANY" used by Gerber Products Company, a corporation organized under the laws of the State of Michigan, located at 445 State Street, Fremont, Michigan 49412.

The application states that the trade name is used in connection with plush toys, crib toys and other merchandise intended for use by infants and small children manufactured in Hong Kong, Taiwan, Malaysia, West Germany, Japan, and Thailand.

Before final action is taken on the application, consideration will be given to any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATE: Comments must be received on or before February 15, 1985.

ADDRESS: Written comments should be addressed to the Commissioner of Customs, Attention: Entry, Licensing and Restricted Merchandise Branch, 1301 Constitution Avenue, NW., Room 2417, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Harriet Lane, Entry, Licensing and Restricted Merchandise Branch, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

Dated: December 12, 1984.

DONALD W. LEWIS,
Director, Entry Procedures
and Penalties Division.

[Published in the Federal Register, December 17, 1984 (49 FR 49014)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

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Morgan Ford
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo

Senior Judges

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Decisions of the United States Court of International Trade

(Slip Op. 84-127)

UNITED STATES OF AMERICA, PLAINTIFF *v.* F.A.G. BEARINGS, LIMITED, DEFENDANT

(Court No. 84-7-01027)

Before: DiCARLO, *Judge.*

MEMORANDUM OPINION AND ORDER

The transition rule of the Customs Procedural Reform and Simplification Act of 1978 requires that 19 U.S.C. § 1592 (1976) and 19 U.S.C. § 1592(e) (1982) apply in actions where administrative proceedings began before January 1, 1979. By its terms, subsection 1592(e)(2)–(4) (1982) does not apply to a case brought under 19 U.S.C. § 1592 (1976). As plaintiff must prove that defendant was "without reasonable cause to believe the truth" of its statements and not prove "fraud," Rule 9(b) does not apply. Plaintiff's complaint is sufficiently detailed to comply with Rule 8(2)(a), and not so "vague and ambiguous" that defendant needs a more definite statement of plaintiff's claim under Rule 12(e).

[Defendant's motion to dismiss the complaint or, alternatively, for a more definite statement is denied]

(Decided: November 28, 1984)

Richard K. Willard, Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*A. David Lafer* and *Francis J. Sailer*), for the plaintiff.

Heron, Burchette, Ruckert & Rothwell (*Thomas A. Rothwell, Jr.* and *John M. Dowd*), for the defendant.

DiCARLO, *Judge:* The plaintiff seeks to recover civil penalties under section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592, as in effect prior to the amendments made by the Customs Procedural Reform and Simplification Act of 1978, Pub. L. 95-410, 92 Stat. 888 (the Reform Act or new law). Defendant is alleged to have made 293 entries using documents containing false statements from January 20, 1972 to January 3, 1977.

Administrative proceedings began with the issuance of a pre-penalty notice on January 31, 1978. A notice of penalty was issued on May 10, 1979, for the forfeiture value of the subject merchandise, $1,342,771.00. The defendant petitioned for remission, under section 618 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1618 (1982), and the forfeiture claim was mitigated to $152,909. Defendant declined to pay that amount and plaintiff filed this suit on July 23, 1984.

Defendant now moves to dismiss the complaint for failure to state a claim for which relief can be granted, or, alternatively, for a more definite statement.

Defendant argues that the complaint fails to state a claim in that it: (1) does not state defendant's degree of culpability under 19 U.S.C. § 1592(e)(2)–(4) (1982); (2) does not state circumstances constituting fraud with the particularity required by Rule 9(b); [1] (3) alleges that the merchandise was entered "by means of" the false statements and (4) does not contain a plain statement of the claim as required by Rule 8(a)(2). Alternatively, defendant claims it is entitled to a more definite statement pursuant to Rule 12(e).

The Court of International Trade is asked to construe, apparently for the first time, the transition rule of the Reform Act.[2] The transition rule provides that the judicial review provision of the Reform Act, subsection 1592(e),[3] becomes effective on the date of enactment, October 3, 1978, while all other provisions apply in actions where administrative proceedings began after January 1, 1979.[4]

It is a "familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *see Intercontinental Fibres, Inc.* v. *United States*, 64 CCPA 31, 33, C.A.D. 1179, 545 F.2d 744, 746 (1976).

Since administrative proceedings began in this action before January 1, 1979, the law existing prior to the Reform Act and section

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[1] Rule 9(b) of this Court states in part:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.

[2] Pub. L. 95–410, § 110(f)(1), 92 Stat. 888, 897 (1978) (codified at 19 U.S.C. § 1592 note (1982)).

Section 110(f) of the Reform Act reads in part:

> (1) (A) Except as provided . . . subsections (a), (b), and (c) (other than new subsection (e) of section 592 of the Tariff Act of 1930 as added by subsection (a)) . . . shall be effective with respect to proceedings commenced after the 89th day after the date of enactment of this Act [Oct. 3, 1978].
>
> . . . . . .
>
> (C) . . . subsection (e) of section 592 of the Tariff Act of 1930 (as added by subsection (a)) shall be effective on the date of enactment of this Act.

[3] Section 1592(e) (1982) states:

> Notwithstanding any other provisions of law, in any proceeding commenced by the United States in the Court of International Trade for the recovery of any monetary penalty claimed under this section—
>
> (1) all issues, including the amount of the penalty, shall be tried de novo;
>
> (2) if the monetary penalty is based on fraud, the United States shall have the burden of proof to establish the alleged violation by clear and convincing evidence;
>
> (3) if the monetary penalty is based on gross negligence, the United States shall have the burden of proof to establish all the elements of the alleged violation; and
>
> (4) if the monetary penalty is based on negligence, the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of the negligence.

[4] The legislative history makes clear that by "proceedings" the rule refers to administrative proceedings. *See* H.R. Conf. Rep. No. 1517, 95th Cong., 2d Sess. 13, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2211, 2255.

(e) of the new law apply. Plaintiff must show "probable cause" that the importer "was without reasonable cause to believe the truth" of its statements. The burden then shifts to the defendant to prove that there was no violation. 19 U.S.C. §§ 1592, 1615 (1976) (amended by the Reform Act).

Defendant's contention that the complaint fails to state a claim since it does not set forth defendant's degree of culpability is without merit. Section 1592(e)(2)–(4) (1982) requires application of the new law burdens of proof only "if the monetary penalty is based on fraud" or "based on gross negligence," or "based on negligence." [5] Where the penalty is based on the old law, as here, and the defendant is alleged to have been "without reasonable cause to believe the truth" of its statements, subsections (2)–(4) have no application.[6]

The action is subject only to subsection (1) of section 1592(e), which provides for *de novo* review of the amount of the penalty.[7]

Defendant's second contention in support of its motion to dismiss is also without merit. Since the plaintiff does not have to prove fraud under the old law, Rule 9(b) does not apply to this action.

Defendant's third argument is that the complaint failed to state a violation because the merchandise was not entered "by means of" the false statements. Defendant relies on *United States* v. *Teraoka*, 669 F.2d 577 (9th Cir. 1982), where the Ninth Circuit Court of Appeals held that 18 U.S.C. § 542, the criminal law analogue of section 1592, was violated only where the false statements resulted in the importation of merchandise that was other excludable.

The Court finds nothing in the legislative history of section 1592 or its antecedents to show that Congress intended the statute to apply only to prohibited merchandise. The Senate Report on the bill that was to become the 1978 Reform Act stated that the purpose of section 1592 was "to encourage accurate completion of the entry documents upon which Customs must relay to assess duties and administer other customs laws." S. Rep. No. 778, 95th Cong., 2d Sess. 17, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2211, 2229. It is unlikely that Congress would emphasize that section 1592 was intended to allow Customs to properly "assess duties" if the statute was meant to apply only to prohibited merchandise.

---

[5] Under the new law, Customs must allege "fraud," "gross negligence," or "negligence," or a combination thereof. The maximum penalty and the burden of proof vary for each standard. *See* 19 U.S.C. § 1592(c)(1)–(3), (e)(2)–(4) (1982).

[6] The Court disagrees with dictum in *United States* v. *R.I.T.A. Organics, Inc.*, 487 F. Supp. 75, 77 n.4 (N.D. Ill. 1980), stating that defendant's "alleged degree of culpability * * * is important with respect to plaintiff's burden of proof" in an old law case.

[7] The purpose of the exception in the transition rule for section (e) was to make immediately effective this major reform of the new law. *See* H.R. Conf. Rep. No. 1517, 95th Cong., 2d Sess. 11–13, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2211, 2253–55.

Under the old law, the only penalty that could be assessed in a section 1592 action was forfeiture of the merchandise involved or a penalty equal to the domestic value of the merchandise. Procedurally, Customs made the initial demand for forfeiture. Upon the filing of a petition by the importer under section 1618, Customs could mitigate the penalty. The importer then risked an all of nothing suit by the government if it refused to pay the amount requested. "Thus, the major deficiency in the [section 1592/1618] procedure was the absence of any meaningful judicial review of an administrative process." Note, *Anachronism Laid to Rest: Customs Reform Act Accomplishes Long Overdue Reform of Section 592 of the Tariff Act of 1930*, 10 Law and Pol'y in Int'l Bus. 1305, 1314 (1978).

Courts have always applied section 1592 and its antecedents to nonprohibited merchandise. *See, e.g. United States* v. *Twenty-five Packages of Panama Hats,* 231 U.S 358 (1913). Defendant's interpretation would "emasculate that provision, depriving the United States Government of one of its more effective and widely-used customs civil enforcement statutes." *United States* v. *F.A.G. Bearings, Corp.,* 8 CIT ——, Slip Op. 84–109 (Oct. 4, 1984), at 15.

The Court holds that section 1592 applies to the merchandise entered by the defendant.

Defendant's fourth ground is that the complaint does not contain a plain statement of the claim as required by Rule 8(a)(2).

Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." The purpose of the identical Rule 8(a)(2) of the Federal Rules of Civil Procedure is to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. . . . Such simplified 'notice pleading is made possible by the liberal opportunity for discovery and other pretrial procedures established by the Rules * * *." *Conley* v. *Gibson,* 355 U.S. 41, 47–48 (1957); *See United States* v. *Appendagez, Inc.,* 5 CIT ——, 560 F. Supp. 50, 54 (1983).

Count I of the complaint alleges:

> * * * defendant or its agent * * * falsely described the imported merchandise as "ball bearings with integral shafts", dutiable at 6 percent under item 680.33, Tariff Schedules of the United States, when, in fact, the merchandise was ball/roller bearings with integral shafts, dutiable at 7.5 percent plus 1.7 cents per pound, under item 680.35, Tariff Schedules of the United States.

Complaint, Paragraph 7.

Count II of the complaint alleges that "declarations made and invoices filled . . . by defendant or its agent with its entries falsely stated the home market price of the imported merchandise." Complaint, Paragraph 13.

The complaint identifies 293 entries by entry numbers, dates of entry, part numbers, quantity and weight, and domestic forfeiture value. Complaint, Annex A.

The Court holds that the complaint is sufficient to give the defendant fair notice of plaintiff's claim.

Finally, defendant's request for a more definite statement under Rule 12(e) is also denied. As demonstrated above, plaintiff's complaint is not "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading" as the Rule requires.

It is hereby ordered that defendant's motion to dismiss, or, alternatively, for a more definite statement is denied.

(Slip Op. 84-128)

SAMUEL KATUNICH, JANE H.M. RIGO AND GUY SERRA, PLAINTIFFS *v.* RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, DEFENDANT

(Court No. 81-9-01158)

Before: RE, *Chief Judge.*

MEMORANDUM OPINION AND ORDER

Plaintiffs, on behalf of the former employees of U.S. Steel's Monroeville, Pennsylvania, Research Laboratory, challenge the Secretary of Labor's denial of certification of eligibility for trade adjustment assistance benefits. In *Katunich* v. *Donovan,* 8 CIT ——, Slip Op. 84-102 (Sept. 6, 1984), this Court held that, since the Secretary utilized an improper base period for evaluating plaintiffs' petition, the Secretary's denial of certification was not supported by substantial evidence, and not in accordance with law. Hence, the court vacated the Secretary's determination, and remanded the action to the Secretary for the issuance of a new determination.

Upon remand, the Secretary using the correct base period for comparison, found that increased imports of steel products contributed importantly to the separation from employment of the workers at U.S. Steel's Monroeville Research Laboratory, and certified them as eligible for trade adjustment assistance benefits.

Held: Since the Secretary's certification of plaintiffs' eligibility for trade adjustment assistance benefits is supported by substantial evidence, and in accordance with law, it is affirmed.

[The Secretary's determination is affirmed.]

(Dated November 30, 1984)

Samuel Katunich, Jane H.M. Rigo and Guy Serra, pro se.

Richard K. Willard, Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*Sheila N. Ziff* on the brief), for the defendant.

RE, *Chief Judge:* Plaintiffs, on behalf of the former employees at the Monroeville Research Laboratory of U.S. Steel, filed a petition with the Secretary of Labor on August 13, 1980, for certification of eligibility for trade adjustment assistance benefits. Upon the denial of certification, plaintiffs, acting pro se, brought this action to challenge the Secretary's final negative determination.

This case is before the court for the fourth time. After its second remand, in *Katunich* v. *Donovan,* 8 CIT ——, Slip Op. 84-102 (Sept. 6, 1984) (*Katunich III*), the Secretary of Labor, on reconsideration, determined that increased imports of steel products contributed importantly to the separation from employment of the former employees of U.S. Steel's Monroeville, Pennsylvania, Research Laboratory. 49 Fed. Reg. 40,494 (1984). Hence, the Secretary reversed his

earlier determination, and decided that plaintiffs were certifiable as eligible for adjustment assistance benefits.

In *Katunich* v. *Donovan,* 5 CIT ——, Slip Op. 83-60 (June 17, 1983) (*Katunich I*), this Court reviewed the administrative record in this action, and found that it was incomplete since the Secretary failed to include the factual basis for his final negative determination. The court, therefore, remanded the action to the Secretary with instructions that he furnish the court with the basis of his final determination.

On July 11, 1983, the Secretary submitted a supplemental administrative record with additional information to support his prior determination. The court, after reviewing the supplemental record and the parties' need for information, granted plaintiffs' motion for disclosure, and directed that the action be submitted for determination upon the administrative record as prescribed by Rule 56.1 of the Rules of this Court. *Katunich* v. *Donovan,* 6 CIT ——, 576 F.Supp. 636 (*Katunich II*).

In *Katunich* v. *Donovan,* 8 CIT ——, Slip Op. 84-102 (Sept. 6, 1984) *Katunich III*), this Court, *inter alia,* found that the method utilized by the Secretary to determine the existence of "increases of imports" under section 222 of the Trade Act of 1974, 19 U.S.C. § 2272 (1982), was defective. Consequently, the court vacated the Secretary's determination that "increases of imports" did not contribute importantly to plaintiffs' separation from employment, and again remanded the action.

Pursuant to establish policy of the Department of Labor, the Secretary has assessed import injury by comparing "increases of Imports" for the year of separation with the year immediately prior to separation. *Paden* v. *United States Dep't of Labor,* 562 F.2d 470 (7th Cir. 1977); *Int'l Union, United Auto. Aerospace and Agricultural Implement Workers* v. *Donovan,* 8 CIT ——, Slip Op. 84-82 (July 10, 1984). It is a sound principle of administrative law that an administrative agency must either follow or adhere to existing policies and precedents or explain its non-compliance or deviation. *See Secretary of Agriculture* v. *United States,* 347 U.S. 645, 653 (1954); *Atchison, T.&S.F.R. Co.* v. *Wichita Bd. of Trade,* 412 U.S. 800, 807 (1973); *Public Interest Research Group* v. *F.C.C.,* 522 F.2d 1060, 1605-06 (1st Cir. 1975), *cert. denied,* 424 U.S. 965 (1976). Therefore, in *Katunich III,* the court would not consider a base period other than the one enunciated and utilized in prior cases, unless the Secretary articulated a valid reason for the departure from his prior judicially approved practice. 8 CIT ——, Slip Op. at 23.

Katunich III, it was evident that the Secretary's assessment of import injury was "not only inconsistent with prior case law, but with his own rulings." *Katunich III,* 8 CIT at ——, Slip Op. at 23. Moreover, the court found that ample data existed in the record for the Secretary to determine that "increases of imports" of steel

products did contribute importantly to plaintiffs' separation from employment.

Upon remand, after applying the correct base period and reviewing all the available data, the Secretary reversed his earlier determination, and decided that plaintiffs were certifiable as eligible for trade adjustment assistance benefits. Since the Secretary has complied with the remand order of *Katunich III,* it is the determination of the court that the certification of eligibility of the former employes of U.S. Steel's Monroeville, Pennsylvania, Research Laboratory is supported by substantial evidence, and in accordance with law.

Accordingly, it is

ORDERED that the Secretary of Labor's determination is hereby affirmed.

(Slip Op. 84-129)

OAK LAMINATES D/O OAK MATERIALS GROUP, PLAINTIFF *v.* THE UNITED STATES, DEFENDANT

(Court No. 81-8-01084)

Before: RE, *Chief Judge.*

MEMORANDUM OPINION AND ORDER

Plaintiff, pursuant to Rule 59(a) of the Rules of the Court of International Trade, moves for a rehearing, or, in the alternative, for the opening of the judgment in *Oak Laminates* v. *United States,* 8 CIT ——, Slip Op. 84-105 (Sept. 25, 1984), to take additional testimony. Plaintiff contends that the court made a "clearly erroneous finding of fact not supported by the record" which compels judgment in its favor.

Held: Since plaintiff did not satisfy the requirements for the granting of a rehearing, and since it is not necessary to open the judgment to take additional testimony, plaintiff's motion is denied.

[Plaintiff's motion requesting a rehearing, or, in the alternative, to open the judgment to take additional testimony, is denied.]

(Decided December 5, 1984)

Barnes, Richardson & Colburn (*David O. Elliott* and *Richard Haroian*) for the plaintiff.

Richard K. Willard, Acting Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, (*Veronica Perry*) for the defendant.

RE, *Chief Judge:* Pursuant to Rule 59(a) of the rules of this Court, plaintiff has moved for a rehearing, or, in the alternative, for the opening of the judgment in *Oak Laminates* v. *United States,* 8 CIT ——, Slip Op. 84-105 (Sept. 25, 1984), to take additional testimony.

In *Oak Laminates,* the imported merchandise consisted of two types of copper clad laminates: "(1) *FR4,* comprised of eight plies of woven fiberglass fabric impregnated by epoxy resin, and (2) *Oak 910,* comprised of three plies of non-woven fiberglass fabric, and impregnated by epoxy resin." 8 CIT ——, Slip Op. at 2. The copper clad laminates were classified by Customs as "articles not specially provided for, of rubber or plastics * * * other," under item 774.55 of the tariff schedules of the United States (TSUS), and assessed with duty at the rate of 8.5% ad valorem. Plaintiff contended that the merchandise was properly classifiable under item 770.05, TSUS, as "articles not specially provided for *wholly or almost wholly of reinforced or laminated plastics,*" duty-free under the Generalized System of Preferences (emphasis added).

After trial, and upon due deliberation and consideration of the testimony, exhibits and briefs submitted by the parties, this Court held that, since both the copper foil and the plastic core were "equally essential," the imported merchandise was not made "wholly or almost wholly of plastic," and that it was properly classified.

By the present motion, plaintiff seeks to have the court amend what it terms a "finding of fact" and direct the entry of a new judgment. Specifically, plaintiff contends that "the Court made a clearly erroneous finding of fact" when it stated that "the testimony clearly showed that unclad laminates have a different core than copper clad laminates." 8 CIT ——, Slip Op. at 14.

The court has carefully reviewed plaintiff's petition, and holds that plaintiff has not satisfied the requirements for the granting of a rehearing, and that the opening of the judgment to take additional testimony is not necessary.

Plaintiff's request to have the court reconsider its prior holding in *Oak Laminates* is, in essence, a second attempt to have the court consider and evaluate the evidence and testimony presented at trial. As stated by the defendant in its opposition to plaintiff's motion for rehearing and amendment of judgment:

> This is the classic "battle of the experts" situation. Plaintiff's dissatisfaction with the court's acceptance of one expert's opinion over another's does not render the court's ultimate conclusion based on such opinion erroneous and does not present the circumstances which merit the granting of a rehearing.

In its judicial opinion in this case the court stated that "the defendant did not merely rely on the statutory presumption of correctness that prevails in customs classification cases. It introduced persuasive expert testimony to refute the testimony of plaintiff's witnesses, and to prove that the merchandise was properly classified by Customs." 8 CIT ——, Slip Op. at 6 (citations omitted).

In support of its assertions of error in this motion plaintiff relies upon and quotes from the testimony of Dr. Konicek, Vice President of Research and Product Engineering at plaintiff's company, Oak

Materials Group. In his testimony, Dr. Konicek traced the evolution of electric circuit technology, and concluded by stating that, "since the laminate core [of the imported merchandise] contains all the components, and provides all the insulating properties of circuit boards, the laminate core is the essential element of the article." 8 CIT ——, Slip Op. at 5.

Plaintiff's assessment of the testimony is clearly refuted by the testimony of Dr. Jablonski, one of defendant's experts. As stated in the court's opinion, "the testimony of Dr. Jablonski and Dr. Bucci [the defendant's experts] clearly refuted plaintiff's contention that it is the plastic laminate core which is the indispensable or essential element of the imported merchandise." 8 CIT ——, Slip Op. at 14. Indeed, the court also stated that it placed "greater reliance upon the testimony of the defendant's experts * * * [who] exhibited full mastery of the subject, and presented clear and convincing testimony as to the importance of the copper foil in the imported merchandise." 8 CIT ——, Slip Op. at 14.

It is well-established that whether a motion for rehearing shall be granted or denied lies within the sound discretion of the court. *See Reynolds Trading Corp.* v. *United States*, 61 CCPA 57, 59, C.A.D. 1120, 496 F.2d 1228, 1230 (1974); *Commonwealth Oil Refining Co.* v. *United States*, 60 CCPA 162, 166, C.A.D. 1105, 480 F.2d 1352, 1355 (1973). *See also* 6A J. Moore, MOORE'S FEDERAL PRACTICE § 59.05[5] (2d ed. 1976). In addition, Rule 59(a) of the Rules of this Court provides that, in an action tried without a jury, a rehearing may be granted "for any of the reasons for which rehearings have heretofore been granted in suits of equity in the courts of the United States * * *."

The appropriate grounds for the granting of a rehearing were set out in *W.J. Byrnes & Co.* v. *United States*, 68 Cust. Ct. 358, C.R.D. 72-5 (1972), in which the court stated that:

> A rehearing may be proper when there has been some error or irregularity in the trial, a serious evidentiary flaw, a discovery of important new evidence which was not available, even to the diligent party, at the time of trial, or an occurrence at trial in the nature of an accident or unpredictable surprise or unavoidable mistake which severely impaired a party's ability to adequately present its case. In short, a rehearing is a method of rectifying a significant flaw in the conduct of the original proceeding.

Id. at 358.

Plaintiff has failed to demonstrate any of the grounds which would justify the granting of the motion. Specifically, plaintiff's motion for a rehearing is based upon its allegations that the court made a misstatement which it terms a clearly erroneous finding of fact. Since there is a substantial basis in the record for the statement of the court, plaintiff cannot be successful under the "clearly erroneous" standard. *See Thompson Tank & Manufacturing Co.* v.

Thompson, 693, F.2d 991, 993 (9th Cir. 1982); *Beaver* v. *United States*, 350 F.2d 4, 11 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966). *See also* USCIT R. 52(a).

The plaintiff's allegation of factual error, in addition to being insufficient as a basis for the granting of a rehearing, is without merit.

The imported articles in this case were copper clad laminates, and not unclad laminates which utilize, for the purpose of adding copper after importation, either a semi-additive or fully-additive process. The question presented, therefore, was whether the imported merchandise consisted of "articles not specially provided for, of rubber or plastics * * * other," or plastics or sheets "wholly or almost wholly of reinforced or laminated plastics."

To determine whether the imported merchandise was "wholly or almost wholly of" plastic, the court examined General Headnote 9(f)(iii) and stated that, in order for the claimed provision to be sustained, plaintiff would have to establish that the plastic core imparted the "essential character" to the imported articles. In reviewing the evidence, the court expressly rejected plaintiff's contention that the plastic core imparted the "essential character" to the copper clad laminate. The court quoted from the testimony of Dr. Jablonski that the laminate was a "composite structure," and concluded that the record left no doubt that the "copper clad laminate" is a composite article, composed of a plastic laminate core *and* copper foil. Hence, the court found that, "even though the plastic core was an essential component of the imported article, the copper foil is also *equally essential*," 8 CIT ——, Slip Op. at 16 (emphasis in original), and concluded:

> The court finds no merit in plaintiff's argument that the plastic core is the essential element of the article. The imported merchandise, therefore, is not classifiable as plates or sheets "almost wholly of reinforced or laminated plastics," admissible duty-free under the Generalized System of Preferences.

8 CIT ——, Slip Op. 16.

By this motion for rehearing, plaintiff contends that "the Court made a clearly erroneous finding of fact inconsistent with the record" when it stated that "the testimony clearly showed that unclad laminates have a different core than copper clad laminates." 8 CIT ——, Slip Op. at 14. Plaintiff further contends that this "incorrect conclusion" was the sole basis upon which the court distinguished *Larry B. Watson Co. a/c Decoration Products Co.* v. *United States*, 64 Cust. Ct. 343, C.D. 4001 (1970), which plaintiff alleges is controlling and, therefore, compels judgment in its favor.

Although the case was tried by experienced counsel who ably presented the contentions of the parties, certain findings and statements in the judicial opinion of the court, in part, depended upon the testimony of expert witnesses. Plaintiff's quarrel with a statement of the court is based upon its evaluation of the testimony of

Dr. Konicek, one of its witnesses, whose testimony is quoted in plaintiff's motion papers. Based upon the testimony of its witnesses, plaintiff asserts that the court "overlooked an uncontradicted fact."

The court's statement that the laminate cores were different is based upon the credible and persuasive testimony of Dr. Jablonski that:

> In my mind, if we look at just the additive, where they add the powder in the core, *I don't think there is any debate that those two cores, the FR–4 core without a powder of the FR–4 core with a powder—that they would definitely be different* when we either transfer the laminate or solution coat, the adhesive, onto what we would call the FR–4 core, you know, does that now become a new core or is it an old core with something on it?
>
> In my mind, that *resulting composite of that we would say is FR–4 core, plus the adhesive on it, and that would be a new core, and it would be called a core. That core is not the same as an FR–4 core.*

Therefore, the basis for the court's statement was the explanation of Dr. Jablonski, one of defendant's experts, that the core of an unclad laminate must contain additional ingredients in order for it to receive copper. The core of the imported merchandise, however, needs only to be combined with copper foil to form a composite article known as a copper clad laminate.

Even if it were to be assumed that plaintiff is correct in its allegation that "as least one unclad laminate [core] * * * is identical to the core of [a] * * * copper clad laminate," the alleged error is not germane to the court's holding. Plaintiff misconceives the basis for the court's decision. The crux of the case was whether the plastic core imparted the "essential character" to the imported article, and not whether the cores of unclad laminates and copper clad laminates are similar or different.

The court has carefully considered the arguments made by plaintiff prior to its decision in *Oak Laminates,* as well as those made on this motion. The court, nevertheless, concludes that plaintiff has failed to rebut the clear and convincing testimony of Dr. Jablonski and Dr. Bucci as to the importance of the copper foil, and its conductive function, to the imported merchandise. As stated in the decision of the court, the record "leaves no doubt that 'copper clad laminate' is a composite article, properly described as composed of a plastic laminate core and copper foil." 8 CIT ——, Slip Op. at 16.

In view of the foregoing, the court reiterates its view that plaintiff relied too heavily upon merchandise not in question, and reaffirms its holding that, since the evidence clearly established that the plastic core and copper foil are "equally essential," the imported merchandise is not "wholly or almost wholly of plastic." Hence, the imported merchandise was properly classified as "articles not

specially provided for, of rubber or plastics * * * other," under item 770.05 of the tariff schedules.

For the foregoing reasons, it is the determination of the court that plaintiff has not satisfied the requirements for the granting of rehearing. Since the court adheres to its earlier findings of fact and conclusions of law in this case, plaintiff's motion requesting a rehearing, or, in the alternative, the opening of the judgment to take additional testimony, is denied.

Decisions of the
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The following abstracts of decisions of the United S
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Protest Decisions

DEPARTMENT OF THE TREASURY, *December 5, 1984.*

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cers of the customs and others concerned. Although the
nt in full, the summary herein given will be of assistance
ng important facts.

WILLIAM VON RAAB,
Commissioner of Customs.

ABSTRACTED PR

Decision number	Judge & Date of decision	Plaintiff	Court No.	Assessed
				Item No. and
P84/358	DiCarlo, J. November 27, 1984	David Peyser Sportswear, Inc.	83-12-01799	Item 379.31 38.3%
P84/359	DiCarlo, J. November 27, 1984	Delta Faucet Co.	83-5-00668	Item 610.80 10.2%
P84/360	DiCarlo, J. November 27, 1984	Delta Faucet Co.	84-3-00296	Item 610.80 9.4% or 11%
P84/361	DiCarlo, J. November 29, 1984	Sanyo Watch Corp.	82-11-01532	Item 740.30 o 740.34, 740.3 18%, 16.7% 35%, 32.4% for bands Item 740.30 o 740.38 27.5% or 25 for chains Items 774.60 c item 774.55 18.5% or 79 Item 791.54 6.5%
P84/362	DiCarlo, J. November 30, 1984	Piano Remittance Corp.	83-1-00091	Item 656.1000 Varions rat
P84/363	DiCarlo, J. November 30, 1984	Zayre Corp.	82-3-00393	Item 737.95 16.2%, 14.9 17.5%

D PROTEST DECISIONS

ssessed	Held	Basis	Port of entry and merchandise
No. and rate	Item No. and rate		
79.31 %	Item 379.95 21¢ per lb. +27.5%	Agreed statement of facts	New York Men's jackets
10.80 %	Item 657.10 3.7%	Agreed statement of facts	Chicago T-Plus Couplings/powder-actuated hand tools
10.80 or %	Item 657.10 3.8%	Agreed statement of facts	Chicago T-Plus Couplings/powder-actuated hand tools
40.30 or 4, 740.35, 16.7% 32.4% ands 40.30 or 8 % or 25.4% hains 774.60 or 774.55 % or 7% 91.54	Item 688.36 5.5% or 5.3%	U.S. v. Texas Instruments, Inc., 673. F.2d 1375 (1982)	New York Solid state electronic digital watches which are comprised of solid state modules and cases imported with appropriate fittings (bands, chains and straps)
56.1000 ons rates	Item A656.1000 Free of duty pursuant to GSP	Agreed statement of facts	New York Gold anodes which are a product of Argentina
37.95 %, 14.9%, %	Item 737.15 Free of duty pursuant to GSP	Agreed statement of facts	Chicago; Boston Die case metal cars

ABSTRACTED PROTEST I

Decision number	Judge & Date of decision	Plaintiff	Court No.	Assessed
				Item No. and r
P84/364	Re, C.J. December 3, 1984	Imperial Freight Brokers, Inc.	79-9-01350, etc.	Items 380.00 380.04, 380.27, 380.84, 382.00 Various rates with no allowance und item 807.00 fo fabric components
P84/365	Re, C.J. December 3, 1984	Mast Industries Inc.	79-3-00477, etc.	Items 380.00 380.04, 380.27, 380.84, 382.00 Various rates with no allowance und item 807.00 fo fabric components
P84/366	Maletz, S.J. December 3, 1984	Creative Playthings	70/14334	Item 737.90 28%

EST DECISIONS—Continued

essed	Held	Basis	Port of entry and merchandise
. and rate	Item No. and rate		
0.00 rates o nce under 07.00 for nents	Buttonhole and pocket slit components properly subject to duty allowance afforded by item 807.00	U.S. v. Mast Industries, 668 F. 2d 501	Miami Wearing apparel; in part of fabric components of U.S. origin subjected to buttonhole and/or pocket slit operations during foreign assembly
0.00 380.27, 382.00 rates o nce under 07.00 for nents	Buttonhole and pocket slit components properly subject to duty allowance afforded by item 807.00	U.S. v. Mast Industries, 668 F. 2d 501	Miami Wearing apparel; in part of fabric components of U.S. origin subjected to buttonhole and/or pocket slit operations during foreign assembly
.90	Item 737.55 16.5%	Creative Playthings v. U.S. (C.D. 4754)	New York Cloth bricks

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